

File

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of James Williams for a Permit)	Case No. 3-SE-94-133
to Construct a Pond to be Ultimately)	
Connected to Genesee Creek, Town of)	
Genesee, Waukesha County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

James Williams applied to the Department of Natural Resources for a permit to construct a connected waterway adjacent to Genesee Creek. On January 25, 1995, the Department of Natural Resources issued an order denying the application. On February 22, 1995, Mr. Williams requested a contested case hearing pursuant to sec. 227.42, Stats., to review the denial. By letter dated March 14, 1995, the Department granted the request for a contested case hearing. On February 27, 1996, the Department of Natural Resources filed a request for hearing with the Division of Hearings and Appeals.

Pursuant to due notice a hearing was held on April 17, 1996, in Waukesha, Wisconsin, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last brief was received on May 6, 1996. A delayed exhibit, a copy of the Waukesha County Shoreland, Floodland Protection Ordinance, was filed on May 30, 1996. A second delayed exhibit, an Environmental Assessment of the proposal (EA), was filed on July 25, 1996. The applicant filed a Supplemental Posthearing Argument addressing issues raised in the EA on August 12, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

James Williams, Applicant, by

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Wisconsin Department of Natural Resources, by

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APPLICABLE LAW

Section 30.19(1)(a), Stats., provides:

Permits required. Unless a permit has been granted by the department or authorization has been granted by the legislature, it is unlawful: 2-

(a) To construct, dredge or enlarge any artificial waterway, canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection with an existing navigable stream, lake or other navigable waters, or where any part of the artificial waterway is located within 500 feet of the ordinary high-water mark of an existing navigable stream, lake or other navigable waters.

Section 30.19(4), Stats., provides in relevant part:

Issuance of permit. If the department finds that the project will not injure public rights or interest, including fish and game habitat, that the project will not cause environmental pollution as defined in s. 144.01 (3) ... the department shall issue a permit authorizing the enlargement of the affected waterways.

FINDINGS OF FACT

1. James Williams, P. O. Box 632, Elm Grove, Wisconsin, 53122, owns property in the Town of Genesee, Waukesha County. The legal description of the property is the SE 1/4 of Section 10, Township 6 North, Range 18 East, Town of Genesee, Waukesha County, Wisconsin. The street address of the property is S30 W30896 Sunset Drive, Genesee, Wisconsin.

2. Mr. Williams' property is part of what was historically known as Wern Farms. Wern Farms was homesteaded by Mr. Williams' great-grandfather in 1848. At its height, it covered over 2,000 acres of land and was the largest dairy farm in the United States. The Williams property currently consists of approximately 130 acres. Mr. Williams previously sold seventy acres of his land for a residential subdivision.

3. By application dated February 11, 1994, Mr. Williams (applicant) applied to the Department of Natural Resources (Department) for a permit pursuant to sec. 30.19(1), Stats. The application seeks a permit to construct a pond which will be connected to one of the three main tributaries of Genesee Creek. The location of the proposed project is immediately north of County Highway DE, and approximately one-quarter mile west of Brookhull Road. The tributary is a navigable waterway south of County Highway DE. 2-

4. Mr. Williams proposes to excavate peat and "create [and] restore [a] pond [and] wetland." According to his application, the purpose of the project is to "remove unwanted weeds [and] restore [a] wetland pond." The depth of the peat in the area of the proposed pond is approximately six to eight feet. The pond will be created by constructing a berm and water control structure. The proposed pond will be approximately twenty acres in size and have a maximum depth of approximately eight feet. -

5. On January 25, 1995, the Department issued an order denying the application. On February 22, 1995, Mr. Williams requested a contested case hearing pursuant to sec. 227.42, Stats., to review the denial. By letter dated March 14, 1995, the Department granted the request for a contested case hearing. The Department and the applicant have complied with all procedural requirements of sec. 30.02, Stats.

6. The site of the proposed project is a wetland. It is classified as a E1Ka wetland on the wetland inventory map. The land is zoned C-1 by Waukesha County. C-1 zoning denotes a conservancy/wetland. Use of land zoned C-1 is limited (see Waukesha County Code, Appendix B sec. 5.03). In general, the Waukesha County Shoreland, Floodland Protection Ordinance, allows recreational and agricultural uses of conservancy areas as long as no filling, flooding, or artificial drainage of any wetlands occurs. With the exception that flooding, dike and dam construction and ditching are allowed for the purpose of growing and harvesting cranberries.

In 1991, Mr. Williams sought to have his land rezoned from C-1. After a public hearing and meeting, this request was denied by the Waukesha County Board of Supervisors and Town Board of the Town of Genesee.

7. The area including the project site was partially drained in the 1930s by constructing drain tiles in an attempt to make it more productive for farming. The water flow which the applicant intends to control to create the pond is from an outlet of the drain tile and several springs which are located on the property. The applicant contends that his project will restore wetlands which were drained without adversely affecting drainage in neighboring subdivisions.

However, approximately twenty acres of wetlands will be eliminated by the creation of the pond and an unspecified amount will be filled for the construction of the proposed berm. The diagram attached to the application does not indicate the existence of any existing, created or restored wetlands (Exhibit 1). A more accurate description of the proposed project is the replacement of a wetland with a pond.

8. Witnesses at the hearing expressed concern with respect to thermal pollution in Genesee Creek. Genesee Creek is a cold-water fishery. It is classified by the Department as a Class I trout stream and an exceptional resource water (sec. NR 102.11, Wis. Adm. Code).

The water flowing into Genesee Creek from the applicant's property comes from the springs and the underground drain tile. If this water flowed into an impoundment before it flowed into Genesee Creek, it would be warmer in the summer and colder in the winter.

This change in temperature will negatively impact on the quality of Genesee Creek as a cold-water fishery. Warmer water in summer will have a negative impact on the ability of Genesee Creek to sustain a trout population because it will reduce the amount of oxygen dissolved in the water and introduce predator fish which will compete with the trout for food and living habitat. Colder water in winter will threaten incubating trout eggs further hampering the ability of Genesee Creek to sustain a naturally reproducing trout population.

9. The applicant disputes that his proposed project will have any impact on the temperature of the water in Genesee Creek. The basis of the applicant's disagreement is that any impact on water temperature in Genesee Creek as a result of the proposed project is *de minimis*. The water draining from the applicant's land flows through two shallow marshes before it reaches the portion of Genesee Creek in which any trout are found. There are also numerous other connected and unconnected ponds draining into tributaries of Genesee Creek. The applicant argues that these marshes and other ponds cause more thermal pollution than will his proposed project.

The record contains no specific evidence of the amount of temperature change in Genesee Creek which will result from the proposed project. However, it is self-evident that water released from a pond will be warmer than that flowing from springs or an underground drain tile. The warming of this water will add to the cumulative impact of thermal pollution in Genesee Creek.

10. The applicant also disputes that a naturally reproducing trout population exists in Genesee Creek. The applicant contends no trout exist in Genesee Creek and if any trout are found in Genesee Creek, they are left from the Brookhill Fish Hatchery which formerly was in operation on Genesee Creek. A fish survey was done on Genesee Creek in 1974 (Exhibit 42) and updated in 1993 (Exhibit 43). The 1993 survey sampled five stations and found trout present at four of the stations, although in reduced numbers from the 1974 survey. The presence of trout in a tributary of Genesee Creek was confirmed as recently as 1995. Based on the evidence in the record, Genesee Creek is currently a viable trout stream.

11. Witnesses at the hearing expressed concern that sediment would be released into Genesee Creek during construction of the proposed project. A risk of discharging sediment into Genesee Creek does exist; however, this discharge can be minimized with appropriate precautions. Such precautions can be imposed as conditions on a permit.

12. Witnesses at the hearing also expressed concern that the proposed project will result in the release of additional organic material into Genesee Creek. The discharge of

organic material will further reduce the amount of oxygen dissolved in the water and degrade the water quality. Although the proposed project will result in organic material being generated in the impoundment which will be discharged into Genesee Creek, the proposed project also includes the excavation and removal of a substantial amount of peat, a highly organic material. The removal of the peat will eliminate one source of organic material. Based on the evidence in the record, it is impossible to determine whether the ultimate impact will be the discharge of more or less organic material than currently into Genesee Creek.

13. Construction of the proposed project will destroy that portion of the wetland where the berm is constructed and where the pond is located. The proposed project will result in significant adverse impacts to the functional values of the affected wetlands and significant adverse impacts to water quality in Genesee Creek.

14. Vegetation in the subject wetland consists primarily of giant ragweed, hemp and stinging nettles. Witnesses for the Department also noted the presence of cattails and reed canary grass below the ordinary high water mark and sedges, spikerush, cattails, goldenrod, reed canary grass and some sandbar willow above the high water mark (Exhibit 32). Currently the wetland does not contain significant floral diversity.

However, the area does have potential for greater floral diversity. A horticulture agent for the University of Wisconsin-Extension expressed the opinion "that if the peat is stripped off and the area becomes covered with shallow water [Mr. Williams] can expect typical wetland plants to move in -- things such as cattails, marsh marigolds, sedges, and various woody species such as willow and redosier dogwood." (emphasis added) (Exhibit 17) The proposed project will adversely impact prospective floral diversity of the subject wetlands.

15. The subject wetland provides habitat for wildlife including songbirds, amphibians and small mammals. The wetlands provide cover and feeding area for resident wildlife such as deer, pheasant, racoon, opossum, cottontail, and songbirds. It is also a feeding area for raptors and cover and feeding area for migratory songbirds. The area also provides winter cover for some wildlife. The proposed project would adversely impact the wetland wildlife habitat functions of the subject wetland.

16. The subject wetland serves a function in flood control as a storm water detention and for filtering runoff water prior to the water draining into Genesee Creek. The importance of these wetland functions has increased and will continue to increase as further residential development occurs in this area. The storm water detention and runoff filtering functions of the wetland will be adversely impacted by the proposed project.

The proposed pond will undoubtedly continue to serve a function in flood control for

the area immediately surrounding the pond; however, it will not be as effective as a wetland in controlling the flow of water into Genesee Creek. Large volumes of storm water draining unfiltered into Genesee Creek will result in downstream erosion along the banks of Genesee Creek and a reduction of water quality in Genesee Creek.

17. Mr. Williams stated purpose for the proposed project is removal of unwanted "weeds" and restore and create a pond and wetland. Removal of undesirable vegetation can be accomplished without destroying the wetlands by flooding. A wetland pond can be created on an upland site which will not involve destruction of the wetlands or be connected to Genesee Creek.

Mr. Williams testified that removal of the undesirable vegetation and creation of the pond is preliminary to a yet undecided productive use of the land. The three possible uses of the land Mr. Williams discussed are growing cranberries¹, aquiculture and development of a residential subdivision. For growing cranberries the pond would presumably be used as a water reservoir for flooding cranberry bogs. For aquiculture, the pond would be used for rearing fish. For the residential subdivision, the pond would be for aesthetic purposes.

Because Mr. Williams has not indicated which, if any, of these possible uses he is seriously considering, an in-depth alternatives analysis is not justified at this time. However, in summary, it should be noted that of the three possible uses only cranberry culture could be considered wetland dependent activity. Aquiculture is water dependent, but not wetland dependent. Development of a residential subdivision is not wetland dependent.

18. The proposed elimination of approximately twenty acres of wetlands by constructing a berm in part of the wetland and excavating peat and creating a pond in part does not satisfy the requirements of Chapter NR 103, Wis. Adm. Code.

19. The area affected is not an area of special natural resource interest within the meaning of sec. NR 103.04, Wis. Adm. Code.

DISCUSSION

The site of the proposed project is a portion of a the former Wern Farm, which at one time was the largest dairy farm in the United States. Historically, the site of the proposed project apparently was wetlands which were tiled in order to use the land for agricultural purposes. The site is no longer farmed and the vegetation on the site is now predominantly

¹If Mr. Williams intention to use the land for cranberry culture is legitimate, a permit pursuant to sec. 30.19(1), Stats., is not required for this purpose. Section 30.19(1m)(b), Stats., excepts agricultural uses of land from the requirements of sec. 30.19(1), Stats.

giant ragweed, hemp and stinging nettles. In his application, Mr. Williams indicated his desire was to restore the wetlands; however, from subsequent submissions to the Department and his testimony at the hearing, it is clear his desire is to find a productive use for the land.

In order to find a productive use for this land, Mr. Williams wishes to construct a pond on the property. The pond would be constructed by excavating peat and constructing a water control structure. Mr. Williams has applied for a permit pursuant to sec. 30.19(1), Stats., to construct a pond. A permit to construct a pond may be issued if it is found that the project will not injure public rights, including fish and game habitat, and will not cause environmental pollution.

The proposed project will have a cumulative adverse impact on Genesee Creek. Genesee Creek is a class I trout stream. A class I trout stream is one which has a naturally reproducing trout population. Trout need clean, cold water. Construction of the proposed pond will result in warmer water being released into Genesee Creek in summer and colder water in winter than is now entering the creek from the end of the drain tile and the springs on the Williams property. One can not predict precisely how much the proposed project will affect water temperature in Genesee Creek. However, the proposed project will have a cumulative impact, along with other sources of thermal pollution along Genesee Creek, which will adversely impact on the ability of Genesee Creek to maintain a natural, viable trout population.

The proposed project would result in the conversion of approximately twenty acres of vegetated wetlands to a pond. Because the proposed project will result in the loss of wetlands, it must also satisfy the requirements of Chapter NR 103, Wis. Adm. Code. In determining whether the requirements of Chapter NR 103, Wis. Adm. Code, are met, the first question which must be answered is whether the proposed activity is wetland dependent and the second question is whether any practicable alternatives exist which will not adversely impact wetlands. According to Mr. Williams' application, the purpose of the project is to "remove unwanted weeds [and] restore [a] wetland pond." These proposed activities do not meet the requirements of Chapter NR 103, Wis. Adm. Code.

The ultimate goal of Mr. Williams is to find a productive use for this land. Mr. Williams has explored various uses for the land; however, until he identifies a specific use, it is impossible to determine whether the proposed activity is wetland dependent or whether practicable alternatives for the activity exist.

CONCLUSIONS OF LAW

1. The proposed project as described in the above Findings of Fact constitutes an enlargement of a navigable body of water for which a permit is required pursuant to sec. 30.19(1), Stats.

2. The proposed project will injure public rights and interests in preserving Genesee Creek as a cold-water fishery and will lower the water quality of Genesee Creek. The lower water quality will result from the loss of the filtering function of the existing wetland.

3. Section NR 103.08(4)(a)2, Wis. Adm. Code, requires the Department make a finding that the requirements of Chapter NR 103, Wis. Adm. Code, are not satisfied if "[a]n activity is not wetland dependent" or a "practicable alternative [for the proposed activity] exists which will not adversely impact wetlands and will not result in other significant adverse environmental consequences." With respect to the purposes stated in the application, removing unwanted weeds and restoring a wetland pond, removing unwanted weeds is not a wetland dependent activity and practicable alternatives exist which do not involve elimination of twenty acres of wetlands. As discussed in the Findings of Facts, none of the proposals presented by Mr. Williams include a restored wetland pond. The proposed project does not meet the requirements of Chapter NR 103, Wis. Adm. Code.

4. Pursuant to sec. NR 150.03(8)(f)2, Wis. Adm. Code, the proposed project is a type II action. Type II actions require the preparation of an environmental assessment or an environmental impact statement. The Department has prepared an environmental assessment in compliance with the provisions of chapter NR 150, Wis. Adm. Code, and sec. 1.11, Stats.

ORDER

IT IS THEREFORE ORDERED that the decision of the Department to deny the application of James Williams for a permit pursuant to sec. 30.19(1), Stats., to construct a pond ultimately connected to Genesee Creek is affirmed.

Dated at Madison, Wisconsin on September 13, 1996.

STATE OF WISCONSIN
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By Mark J. Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.